

V I R G I N I A:

IN THE CIRCUIT COURT  
FOR THE CITY OF ROANOKE

- - - - -  
SHARON G. WINGATE, :  
Executor of the Estate of :  
DOUGLAS GRAY WINGATE, :  
Deceased, :  
Plaintiff, :  
vs. : Case No.: C112-2547  
INSIGHT HEALTH CORP., :  
Defendant/  
Cross-Claim Defendant, :  
vs. :  
JOHN M. MATHIS, M.D., ROBERT :  
F. O'BRIEN, M.D., and IMAGE :  
GUIDED PAIN MANAGEMENT, PC, :  
Defendant/  
Cross-Claim Plaintiff, :  
- - - - -

APRIL 5, 2013  
10:00 A.M.

HEARD BEFORE:  
THE HONORABLE CHARLES N. DORSEY

CENTRAL VIRGINIA REPORTERS  
P.O. BOX 12628  
ROANOKE, VA 24027  
(540) 380-5017

APPEARANCES:

GENTRY, LOCKE, RAKES & MOORE  
Roanoke, Virginia  
BY: J. SCOTT SEXTON, ESQ.  
DANIEL SULLIVAN, ESQ.

Counsel on behalf of the Plaintiff

LECLAIR RYAN  
Roanoke, Virginia  
BY: NANCY REYNOLDS, ESQ.  
MICHAEL P. GARDNER, ESQ.

Counsel on behalf of Dr. Mathis,  
Dr. O'Brien, and Image Guided Pain  
Management

BONNER, KIERNAN, TREBACH & CROCIATA  
Washington, DC  
BY: CLINTON R. SHAW, JR., ESQ.

Counsel on behalf of Insight Health  
Corporation

\* \* \* \* \*

Whereupon, the following cause came to be heard before the Honorable Charles Dorsey, Judge of the Circuit Court of Roanoke, Virginia, sitting in Roanoke, Virginia, on the 5th day of April, 2013, in the presence of those listed under "Appearances" on Page 2 herein.

The Court Reporter, Cynthia N. Stiles, CCR, was duly sworn.

1 (10:35 a.m.)

2 PROCEEDINGS

3

4 THE COURT: All right. In no particular  
5 order, we have circuit court civil file, and these  
6 are all city cases being heard in the City:  
7 CL13-0057, Smith versus Mathis and others;  
8 CL13-0055, Harris versus Insight and others;  
9 CL13-0009, Foutz versus Insight and others;  
10 CL12-2571, Epperly versus Insight and others.

11 Just for the purpose of getting to it: We  
12 also have CL12-2547, Wingate versus Insight and  
13 others; CL12-2573, McFarlane versus Insight and  
14 others; CL12-2574, Kalinoski versus Insight and  
15 others; CL12-2575, Filson versus Insight and  
16 others; CL12-2576, Bradley versus Insight and  
17 others; and CL12-2572, Smith versus Insight and  
18 others.

19 First of all, are there any -- And I have the  
20 oath of the Court Reporter, and it's been entered  
21 as to all those matters for the purposes of today's  
22 hearing.

23 What I'd like to do is get each counsel to  
24 identify themselves on the record, announce whether

1           they're ready or not, announce who they represent,  
2           and specifically let me know if there are any other  
3           files that should have been read that were not  
4           included for the purposes of this hearing that you  
5           think are included. And let me start, Mr. Sexton,  
6           with you.

7           MR. SEXTON: Yes, Your Honor. Scott Sexton  
8           and Dan Sullivan from Gentry Locke, representing  
9           the Plaintiffs in each of the cases that you named.

10          I tried to keep a careful listen, but did you  
11         name the matter CL13-0054, which is Whitlow versus  
12         Insight?

13          THE COURT: I do not think I did.

14          MR. SEXTON: The Court Reporter is indicating  
15         that you did not; and so that's an additional case  
16         that is set for hearing today as well on a motion  
17         for partial summary judgment.

18          THE COURT: All right. If I need that, I'll  
19         have it brought in. Otherwise, I assume that these  
20         issues are shared by all or most of these,  
21         dependent upon the issue.

22          MR. SEXTON: They're identical in each case.

23          THE COURT: All right. So 13, what was it,  
24         0054?

1           get the number of lawyers that we have here and/or  
2           more, I think all of us start getting a little, a  
3           little concerned, you know, when I start getting 13  
4           or 14 lawyers, that one person endorses for all of  
5           them.

6           Now, I've not yet had a problem with that,  
7           however. So all I'm going to say is I get  
8           sensitive about that. But no, I don't like that.  
9           And I will accept, though, Mr. Sexton, particularly  
10          in today's world in this kind of case and with  
11          where the offices are and that sort of thing, I  
12          will accept fax'ed endorsements, if that will  
13          simplify matters, so it doesn't take two months to  
14          send something around by mail. I agree with you; I  
15          want to get the orders in and get them entered.

16           Any way you all want to do it is fine. Yeah,  
17          I'm not going to compel people to give up rights to  
18          endorsement. I don't like that personally.

19           So that takes care of that. And Miss  
20          Reynolds, you've got demurrers?

21           MS. REYNOLDS: Yes, sir.

22           THE COURT: All right.

23           MS. REYNOLDS: Mr. Gardner and I have  
24          demurrers on behalf of Dr. Mathis, Dr. O'Brien,

1           Image Guided Pain Management, which we'll refer to  
2           as IGPM collectively.

3           The demurrers, first stating the standard for  
4           demurrer, admits the truth of all properly pled  
5           material facts in the complaint, and all reasonable  
6           factual inferences fairly and justly drawn from the  
7           facts alleged.

8           THE COURT: Yeah, and I understand that. I  
9           know where the demurrers are, and I understand what  
10          a demurrer is.

11          MS. REYNOLDS: We are demurring to Count 2,  
12          Consumer Protection Act, Count 4, gross negligence,  
13          Count 5, fraud, and to the punitive damages claim.

14          Your Honor, I don't see that it's necessary to  
15          go through the specific facts, unless the Court  
16          wants to hear. I think you heard sufficiently the  
17          last time we were here.

18          Suffice it to say that Mr. Wingate went to the  
19          Insight Imaging Roanoke location on September 6 of  
20          2012 for an epidural steroid injection in his C  
21          spine for shoulder pain. Dr. O'Brien administered  
22          that injection. Subsequent to that, he was found  
23          to have meningitis and passed.

24          The steroid used was methylprednisolone

1 acetate, compounded and supplied by NECC, purchased  
2 by Insight Health for the Roanoke location. And I  
3 turn it over to Mr. Gardner, who will argue the  
4 Consumer Protection Act and gross negligence count.

5 THE COURT: I don't usually split up  
6 arguments, like I don't usually split up  
7 cross-examination; but sure, go ahead, Mr. Gardner.

8 MS. REYNOLDS: Well, Your Honor, he's --

9 THE COURT: Go ahead, Mr. Gardner.

10 MR. GARDNER: Thank you, Your Honor. There  
11 are two aspects to IGPM's demurrer to the Virginia  
12 Consumer Protection Act claim.

13 The first is that the claim of violation of  
14 VCPA, which I will abbreviate the Virginia Consumer  
15 Protection Act as, for misrepresenting the drug's  
16 quality during IGPM's treatment of the Decedent is  
17 expressly excluded under the language of the  
18 statute; and the second aspect is that damages for  
19 wrongful death and personal injury are not  
20 available under the VCPA.

21 First, the claim is expressly excluded under  
22 Section 59.1-199(A) of the act of the VCPA. That  
23 section states that the VCPA shall not apply to,  
24 "any aspect of a consumer transaction, which aspect

1           is authorized under the laws and regulations of  
2           this Commonwealth or the United States."

3           In other words, if the aspect complained of is  
4           authorized under another section of Virginia or  
5           federal law, then the VCPA does not apply, and the  
6           claim cannot be brought for it under the VPCA.

7           The Virginia Supreme Court examined this  
8           provision in *Manassas Auto Parts, Inc. v. Couch*,  
9           274 Va. 82. They held that, "Authorized actions,"  
10          meaning actions which are excluded, are those that  
11          are "sanctioned by statute or regulation." In  
12          other words, actions that are sanctioned by  
13          Virginia or federal law cannot be complained of  
14          under the Virginia Consumer Protection Act.

15          Conversely, actions that are merely regulated  
16          by Virginia or federal law can be actionable under  
17          the Virginia Consumer Protection Act. Here the  
18          formulation, compounding, sale, prescription,  
19          dispensing and administration of prescription drugs  
20          are sanctioned under Virginia and federal law, and  
21          therefore are expressly excluded from the Virginia  
22          Consumer Protection Act.

23          Section 54.1-3408(A) of Virginia's Drug  
24          Control Act states that, "A practitioner of

1           medicine shall only prescribe, dispense or  
2           administer controlled substances in good faith, for  
3           medicinal or therapeutic purposes, within the  
4           course of his professional practice."

5           There are Virginia Code sections that prohibit  
6           the compounding of drugs, unless certain criteria  
7           are met. Similarly, the federal Food, Drug and  
8           Cosmetic Act prohibits the introduction or delivery  
9           for introduction in interstate commerce of any  
10          food, drug, device, tobacco product or cosmetic  
11          that is adulterated or misbranded -- the exact  
12          allegations in this case.

13          These provisions, these federal and Virginia  
14          provisions are not mere regulations by which an  
15          already permissible action are undertaken. In --

16          MR. SEXTON: I'm sorry, Mr. Gardner. I may be  
17          the only one in the courtroom that's confused, but  
18          I thought Your Honor ruled that you accepted the  
19          removal by Mr. Shaw of the Wingate matter, and the  
20          demurrers are only set in the Wingate matter. And  
21          then I thought you explained to us --

22          THE COURT: I still have to hear them. If  
23          they're here, I'll hear them on whatever.

24          MR. SEXTON: Okay. I heard you to say that

1           you would then not want to be in conflict with the  
2           federal court and so forth.

3           THE COURT: You heard me entirely correctly.

4           MR. SEXTON: Okay. I just misunderstood the  
5           import of that.

6           THE COURT: No no no. And what one of my  
7           questions was and what I wasn't clear on is, is  
8           this only on the Wingate matter?

9           MR. GARDNER: This is noticed for Wingate, but  
10          as with the motions for partial summary judgment,  
11          they will be basically identical through all of  
12          these cases.

13          MR. SEXTON: It is only noticed on Wingate,  
14          but again, there's a trickle.

15          THE COURT: Well, I mean --

16          MR. SEXTON: We don't have any objection. I  
17          just wanted to make sure that I understood that you  
18          want to go ahead and hear the argument.

19          Right. It is, it is only briefed as to  
20          Wingate. There are some instances where the facts  
21          may be different; for example, Mr. Wingate is dead,  
22          and we don't know exactly when he got these  
23          brochures. Some of the clients are not dead. Some  
24          of the clients got three shots, and so they would

1           have received them on multiple occasions. So that  
2           will apply to one aspect, but --

3           THE COURT: But you don't --

4           MR. SEXTON: We could educate you as to --

5           THE COURT: But you don't have any objection  
6           to, you know, on lack of formal notice. Yeah, I  
7           don't intend to deal with demurrer on Wingate, but  
8           my understanding is like your partial summary  
9           judgment, that this was common to all cases.

10          MR. SEXTON: In essence --

11          THE COURT: *Mutatis mutandis*, as we say.

12          MR. GARDNER: And I'd be willing to stipulate  
13          that these motions don't turn on some of the minute  
14          factual differences between the cases. To the  
15          extent that they do, please let me know if I  
16          mention something that is unique and it turns on  
17          it, please do.

18          THE COURT: I'm sure they will. I'll let you  
19          know.

20          MR. SEXTON: Your Honor, I have no objection  
21          to any of that, if it does avoid a waste of time  
22          today, and it allows us to --

23          THE COURT: That was my point. I just thought  
24          we'd go ahead and put on everything we can put on.